Filed 9/28/16 In re Kayla B. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re KAYLA B., a Person Coming Under the Juvenile Court Law.	B267868 (Los Angeles County Super. Ct. No. DK10923)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MIRTHA G., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Judge. Reversed.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Jessica Paulson-Duffy, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile dependency court declared minor Kayla B. a dependent under Welfare and Institutions Code section 300,[1] subdivision (b) based on an allegation that on one occasion while Kayla was a passenger in her mother, Mirtha G.'s (Mother) vehicle, Mother drove under the influence of alcohol and struck a pedestrian. Mother argues that this court should reverse because sufficient evidence did not support the juvenile court's finding that her conduct placed Kayla at substantial risk of future harm. For the reasons articulated below, we agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Kayla (born in 2011) came to the attention of the Department of Children and Family Services (DCFS) in April 2015, when DCFS received a referral indicating that Mother had been arrested for felony driving under the influence (DUI) on the freeway and causing an accident that injured a pedestrian.[2] At the time of the accident, Kayla was restrained in her car seat and not injured. DCFS filed a petition under section 300, subdivision (b), alleging that on April 19, 2015, Mother had placed the child in a detrimental and dangerous situation by driving a vehicle while under the influence of alcohol and causing an accident.

According to the detention report, the California Highway Patrol Officer who investigated the accident informed DCFS that Mother had been involved in a traffic accident on the freeway at 3:00 a.m. on April 19, 2015, and arrested for a felony DUI. The officer stated that all lanes of traffic had merged into a single lane because of freeway construction on the morning of the accident and that two vehicles were parked on the shoulder of the freeway where the lanes merged. As a person exited one of the vehicles, Mother's vehicle struck the person, who was subsequently treated for minor injuries at a hospital.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Kayla's father, Hugo B., is not a party to the dependency case.

Mother admitted that she had consumed alcohol that evening. Mother told the officer that she was driving about 10 miles per hour when she struck the pedestrian. An eyewitness, however, estimated Mother's vehicle to be traveling approximately 35 miles per hour at the time. In addition, another eyewitness reported that Mother's car struck one of the parked cars before hitting the pedestrian. According to the officer, Mother smelled of alcohol, and field sobriety tests revealed that Mother was under the influence. Mother asked for a lawyer and refused to submit to blood or chemical testing to confirm her blood alcohol level.

Later on the day of the accident, Mother spoke with a DCFS social worker. Mother was "tearful," admitting that she had caused the accident. She and Kayla had been at a party the prior evening, where she claimed she had consumed one drink before she left. Nonetheless, Mother did not believe that she was intoxicated at the time. Mother said she had never been arrested, had no history of drug use, or mental illness; the family had no prior referral or case history with DCFS. Mother had a Bachelor's Degree in Child Development, a Master's Degree in School Psychology and was a licensed school psychologist. She told DCFS that she would cooperate.

Kayla was interviewed and assessed; she appeared to be happy, healthy and well cared for by Mother. When DCFS interviewed the father, he reported that he and Mother were divorced and that they shared custody of Kayla. He stated that to his knowledge, Mother's arrest for drunk driving was the first time anything like that had ever happened and that he had no concerns about her as a parent.

At the detention hearing on April 22, 2015, the court found a prima facie case for detaining Kayla from Mother and released Kayla to her father. The court also ordered family maintenance services and monitored visitation for Mother. The court ordered DCFS to refer Mother to weekly drug and alcohol testing, as well as to provide her with program referrals.

In the jurisdiction report, DCFS confirmed that Mother had no criminal history, other than her arrest for the April 19, 2015, incident. Upon the advice of her criminal defense attorney, Mother declined to be interviewed again by DCFS because her criminal

case was still pending. She, however, provided proof that on May 18, 2015, she had enrolled in a three-month "Alcohol Education And Recovery Center" program/DUI class through the criminal court.

Father was also re-interviewed. He told DCFS he was "shocked" by the incident, stating that Mother had always acted responsibly and that she was a good mother. He had never seen her drink more than a few alcoholic beverages, and he stated that she would "never over do it." He had no knowledge of substance abuse by Mother. According to the father, when he asked her about the incident, Mother stated she drank one beer at the party that night and claimed that she was not intoxicated when she drove home. She told him she decided to drive home that night because she wanted Kayla to sleep in her bed.

DCFS opined that the family's strengths included that the child was healthy, that the parents had family support, and that Mother was willing to accept services. DCFS also noted that Mother reported that she would comply with the court's orders so she would be reunited with her daughter as soon as possible. Mother had provided a copy of her June 3, 2015, enrollment in an outpatient substance abuse program. Nonetheless, DCFS recommended that the court sustain the petition because of the "severity of the case"—"Mother's poor judgment placed the child in severe danger" and because Mother had only "recently enrolled in a program and [had] yet to address her issues."

At the jurisdiction hearing on June 9, 2015, the court admitted DCFS's reports and attachments into evidence and then proceeded to the argument.[3] Mother's counsel argued that even assuming that Mother had driven under the influence and had caused the accident, under *In re J.N.* (2010) 181 Cal.App.4th 1010, the juvenile court should dismiss the dependency petition. Mother's counsel argued that because Kayla had not been injured, and because of the absence of evidence of prior incidents or a substance abuse problem, there was no evidence that Kayla was at risk of future harm. Counsel also

[3] The court noted on the record that Mother had stated that if called to testify she would, upon the advice of her criminal defense attorney, invoke her right not to testify.

pointed out that since the court ordered her to do so at the detention hearing, Mother had been participating in alcohol testing once per week (and that the tests had all been negative), and that she had enrolled in court-ordered treatment programs and classes.

The juvenile court distinguished this case from *In re J.N.*, noting that although the dependency petition had been filed on April 19, 2015, Mother had not enrolled in a substance abuse treatment program until June 3, 2015. Kayla's counsel and DCFS requested the court sustain the dependency petition, arguing that Mother had acted unreasonably and had minimized her responsibility, understating her speed at the time of the accident. The juvenile court sustained the section 300 petition and continued the dispositional hearing for DCFS to address the status of Mother's alcohol testing and programs.

Thereafter on July 24, 2015, the juvenile court released Kayla to both parents, conditioned on their compliance with services, and continued the disposition to December 2015, to address dismissal under section 360, subdivision (b). On August 3, 2015, Mother filed a notice of appeal.[4]

[4] On May 18, 2016, the DCFS filed a request for judicial notice of a December 9, 2015 order from the dependency court dismissing the dependency case. The DCFS also filed a motion to dismiss the appeal arguing that the dismissal of the dependency case rendered Mother's appeal moot. Although we granted the motion for judicial notice, we denied the motion to dismiss. The sustained jurisdictional allegation against Mother may have other adverse consequences for her in future proceedings. (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 ["[W]e generally will exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding . . . could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citation]; or . . . 'could have other consequences for [the appellant], beyond jurisdiction.' "].) Accordingly, even though the court dismissed the petition, we will decide Mother's claim that sufficient evidence did not support the section 300, subdivision (b) allegation against her.

DISCUSSION

Welfare and Institutions Code section 300, subdivision (b) requires proof of three elements: " '(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the minor, or a "substantial risk" of such harm or illness.' (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) 'The third element "effectively requires a showing that at the time of the jurisdiction hearing the child is at *substantial* risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur). [Citations.]" ' " (*In re J.O.* (2009) 178 Cal.App.4th 139, 152, italics added.) " ['Section 300, "subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." [Citation.]' " (*In re David M.* (2005) 134 Cal.App.4th 822, 829; accord, *In re John M.* (2013) 217 Cal.App.4th 410, 418.)

DCFS had the burden to present evidence of a specific, non-speculative and substantial risk to the minor of serious physical harm based on Mother's conduct. (*In re David M.*, *supra*, 134 Cal.App.4th at p. 830.) It failed to make that showing. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461 [the standard of proof at a jurisdictional hearing is a preponderance of the evidence; this court reviews the court's findings under the substantial evidence standard].) The record lacks sufficient evidence that Kayla suffered, or was at substantial risk of suffering, serious physical harm as a result of his Mother's conduct even though Mother, on one occasion, drove under the influence of alcohol and caused an accident while Kayla was a passenger in Mother's vehicle.

In *In re J.N.*, *supra*, the father drove the family minivan into a light pole while both parents were drunk, injuring two of their children. (181 Cal.App.4th at pp. 1014-1015.) Both parents denied regular alcohol use, a fact echoed by their eldest child, who stated that his mother "drank a beer once in a while" and his father drank "only one or two beers a couple times per month." (*Id*. at p. 1017.) Based on the severity of the single incident, the dependency court exercised jurisdiction over the children under

section 300, subdivision (b). (*Id.* at p. 1021.) The appellate court reversed, holding that "[d]espite the profound seriousness of the parents' endangering conduct on the one occasion in this case, there was no evidence from which to infer there is a substantial risk such behavior will recur." (*Id.* at p. 1026.) In fact, "[t]he evidence as a whole did not even establish that mother or father consumed alcohol on a regular basis." (*Ibid.*) As such, "[t]he evidence was not sufficient to establish that the children were at substantial risk of serious physical injury as the result of parental inability to adequately supervise or protect the children." (*Id.* at p. 1027.) "In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances." (*Id.* at p. 1025; see also *In re John M.*, *supra*, 217 Cal.App.4th at pp. 418-419.)

Similarly here, although the incident was the result of Mother's poor judgment, there was no showing that Kayla suffered any harm in the accident or was at substantial risk of future harm. As DCFS correctly points out, however, Mother did not accurately recount the accident details, and likely underestimated the amount of alcohol she had consumed and her level of intoxication at the time. And Mother did not immediately enroll in a substance abuse program. Nonetheless, DCFS's conclusion based on this evidence, that Mother "did not appear prone to continue in a substance abuse program in the absence of a court order," is speculative. (See *In re David M.*, *supra*, 134 Cal.App.4th at p. 828 [inferences must be " 'a product of logic and reason' " and " 'must rest on the evidence' "; inferences that are the result of conjecture cannot support a jurisdictional finding].) DCFS's reports disclosed that Mother agreed to cooperate with DCFS and the court orders to do what was necessary to regain custody of Kayla. She enrolled in a substance abuse program, and a DUI class, and according to her counsel, consistently tested negatively for alcohol *before* the jurisdictional hearing. Mother took responsibility for her actions—she admitted that she had consumed alcohol and that she caused the accident. There is no evidence she had engaged in similar conduct either before or after April 19, 2015. Indeed, the father, who shared in parenting Kayla with Mother, reported that this was an isolated incident and that Mother was a good parent.

And DCFS confirmed that Kayla was well cared for by Mother. In addition, Mother had no criminal history or prior involvement with the dependency system and had a stable work history. Consequently, there is not sufficient evidence to support a reasonable inference that Mother's conduct on April 19, 2015, would recur or that the child was otherwise at substantial risk of serious harm.

DISPOSITION

The jurisdictional order is reversed. In light of the subsequent order terminating juvenile court jurisdiction, no remand for further proceedings is necessary.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.